87

(2)

FILED
MAR 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-866

In the Supreme Court of the United States

VICTOR SARAVIA-PAGUADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
BRYAN S. BEIER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under 8 U.S.C. 1182(c) (1994), the Attorney General lacked the discretion to waive the civil immigration consequences of certain criminal convictions for an alien "who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." The question presented is as follows:

Whether, for purposes of 8 U.S.C. 1182(c) (1994), the "term of imprisonment" that an alien served for an aggravated felony includes time that the alien served for the felony by virtue of his status as a repeat offender.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 8
Gryger v. *Burke*, 334 U.S. 728 (1948) 8
INS v. *St. Cyr*, 533 U.S. 289 (2001) 2, 9
Rusz v. *Ashcroft*, 376 F.3d 1182 (9th Cir. 2004) 5
Saravia-Paguada v. *Ridge*, No. C 04-03940 JSW, 2005 WL 88967 (N.D. Cal. Jan. 13, 2005) 4
United States v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) 5
United States v. *Rodriquez*, 464 F.3d 1072 (9th Cir. 2006), cert. granted, No. 06-1646 (argued Jan. 15, 2008) 5
Wisniewski v. *United States*, 353 U.S. 901 (1957) 10

Statutes:

Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004) 9
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 2

Statutes—Continued: Page

Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1182(c) (1988) (§ 212(c)) 2
8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*
8 U.S.C. 1229b (2000 & Supp. V 2005) (§ 240A) 2, 9
8 U.S.C. 1229b(a)(3) (§ 240A(a)(3)) 2
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 4
§ 106(c), 119 Stat. 311 5
Cal. Health & Safety Code § 11370.2 (West 2007) 3

In the Supreme Court of the United States

No. 07-866

VICTOR SARAVIA-PAGUADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 488 F.3d 1122. The decision of the Board of Immigration Appeals (Pet. App. 30) and the initial decision of the immigration judge (Pet. App. 37-50) are unreported.

JURISDICTION

The court of appeals entered its judgment on May 21, 2007. A petition for rehearing was denied on October 4, 2007 (Pet. App. 51). The petition for a writ of certiorari was filed on December 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988), the Attorney General was given the discretion to waive the civil immigration consequences of, *inter alia*, certain criminal convictions for lawful permanent residents who had been domiciled in the United States for seven consecutive years. Although that statute, by its terms, gave the Attorney General the discretion only to admit aliens who had temporarily gone abroad, it was construed to apply also to aliens who were already in the country but subject to deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295-296 (2001).

In the Immigration Act of 1990, Congress imposed limits on the ability of the Attorney General to grant waivers under Section 212(c). See Pub. L. No. 101-649, § 511, 104 Stat. 5052. As amended by technical amendments that are concededly applicable here, the relevant provision prohibited the Attorney General from granting a waiver to an alien "who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. 212(c) (1994). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c) altogether. See Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597.[1]

---

[1] At the same time that it repealed Section 212(c), Congress enacted new Section 240A, 8 U.S.C. 1229b (2000 & Supp. V 2005), which provides for a similar form of discretionary relief known as cancellation of removal. Cancellation of removal, however, is unavailable for *any* alien who has been convicted of an aggravated felony, without any discrete requirement concerning the term of imprisonment that the alien served for that felony. See 8 U.S.C. 1229b(a)(3).

2. Petitioner is a Honduran national who entered the United States as a lawful permanent resident in 1966. In 1988, petitioner was convicted of, *inter alia*, conspiracy to sell methamphetamine and cocaine, possession of cocaine for sale, and possession of methamphetamine for sale, all in violation of California law. He was sentenced to a total of 68 months for those offenses (to be served consecutively), and actually served a total of 38 months. The Immigration and Naturalization Service then commenced deportation proceedings against him; petitioner conceded that he was deportable, but sought discretionary relief under Section 212(c). In 1992, while deportation proceedings were ongoing, petitioner was convicted of possession of methamphetamine for sale and cultivation of marijuana, again in violation of California law. He was sentenced to a total of 76 months for those offenses (to be served consecutively); that sentence included a 36-month recidivist enhancement, based on his prior California drug convictions. See Cal. Health & Safety Code § 11370.2 (West 2007). Petitioner actually served a total of 39 months. Pet. App. 3-4, 37-45; Pet. 8-9.

After petitioner was again released from prison, the deportation proceedings against him resumed. In 1996, an immigration judge ordered petitioner's deportation. Pet. App. 37-50. In his oral decision, the judge held that petitioner was ineligible for a waiver under the applicable version of Section 212(c) because he "ha[d] spent more than five years in incarceration on convictions for aggravated felonies." *Id.* at 49. As is relevant here, the judge rejected petitioner's contention that, in applying Section 212(c), the judge "should not include the three-year sentence * * * enhancement in the 1992 conviction." *Id.* at 48. The judge explained that the enhance-

ment was part of the sentence for the offense of selling methamphetamine and that the "total sentence" for that offense included the enhancement. *Id.* at 48-49.

3. After subsequent proceedings on issues not relevant here, the Board of Immigration Appeals affirmed the immigration judge's initial decision in a summary order. Pet. App. 30. Petitioner then filed a petition for review in the Ninth Circuit, which was dismissed for lack of jurisdiction. *Id.* at 7. Petitioner was thereafter ordered to surrender for deportation. *Ibid.*

4. In 2004, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The district court denied the petition. See *Saravia-Paguada* v. *Ridge*, No. C 04-03940 JSW, 2005 WL 88967 (Jan. 13, 2005). Like the immigration judge, the district court rejected petitioner's contention that, for purposes of Section 212(c), the "term of imprisonment" that he served for his prior felonies excluded time that he served by virtue of his status as a repeat offender. *Id.* at *5. The court reasoned that, "[u]nder the plain language of the statute, there is no requirement that the time served must be for only convictions of substantive criminal offenses," and added that "[p]etitioner has not presented any authority supporting his argument that the time he served under a sentence enhancement may not be considered in determining whether [p]etitioner served a term of at least five years in prison" for purposes of Section 212(c). *Ibid.*

While petitioner's motion to amend the judgment was pending, Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which required that all then-pending habeas petitions challenging removal be transferred to the relevant courts of appeals

and treated as petitions for review. See *id.* § 106(c), 119 Stat. 311. Pursuant to that provision, the district court transferred the case to the Ninth Circuit. Pet. App. 7.

5. Treating petitioner's habeas petition as a petition for review, the court of appeals denied the petition. Pet. App. 1-28.

The court of appeals rejected petitioner's contention that, for purposes of Section 212(c), the "term of imprisonment" excluded time that he served by virtue of his status as a repeat offender. Pet. App. 7-15. Specifically, the court rejected petitioner's reliance on its earlier decisions in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc); *Rusz* v. *Ashcroft*, 376 F.3d 1182 (9th Cir. 2004); and *United States* v. *Rodriquez*, 464 F.3d 1072 (9th Cir. 2006), cert. granted, No. 06-1646 (argued Jan. 15, 2008). Pet. App. 8-11. The court explained that, under the statutes in those cases, the issue was "whether or not [an individual had] committed certain past crimes * * *, the *nature* of which might give rise to adverse consequences attaching to a present conviction"—and, the court reasoned, it was therefore appropriate to exclude recidivism enhancements in computing the potential maximum term of imprisonment for a prior offense under those statutes. *Id.* at 10-11. By contrast, under Section 212(c), "[t]he focus * * * is on calculating the *amount* of time served *on account* of the felony convictions, which is an inquiry not related to the nature of the offense under [a] categorical approach." *Id.* at 11.

The court of appeals stated that "[t]he question here is straightforward: whether [p]etitioner 'served for such felony or felonies a term of imprisonment of at least 5 years.'" Pet. App. 11 (quoting 8 U.S.C. 1182(c) (1994)). The court agreed with the immigration judge that "the

enhancement is not separable from the sentence"; instead, "the enhancement is, by definition, an additional term of imprisonment added to the base term, which is imposed because of some aggravating circumstance such as recidivism." *Id.* at 12 (internal quotation marks and citation omitted). "Because the terms of the statute require a court only to determine the ultimate amount of time served," the court of appeals continued, "it is immaterial whether a sentencing enhancement may have increased the base term." *Ibid.*

The court of appeals added that "[p]etitioner's interpretation * * * creates practical difficulties Congress cannot have intended." Pet. App. 12-13. The court explained that "[a] requirement to prorate the 'time served' based on any conceivable aggravating factors a sentencing judge might apply would be unworkable[,] because the [immigration judge] would be forced to contrive proportionate values for each aggravating factor, then deduct those artificial values from the imposed sentence." *Id.* at 13. The court concluded that "such an unwieldy approach" would be "contrary to [Section 212(c)'s] plain meaning." *Ibid.*

Finally, the court of appeals rejected petitioner's contention that the inclusion of the phrase "for such felony or felonies" in the technical amendments to Section 212(c) "exhibited an intent that the time served be calculated without regard to sentencing enhancements." Pet. App. 13. The court explained that the purpose of that amendment was simply to "clarify that the bar [to Section 212(c) relief] applied to multiple aggravated felons"—*i.e.*, individuals who had committed multiple aggravated felonies—"whose *aggregate* terms of imprison-

ment exceeded five years." *Ibid.* (emphasis added; citation omitted).[2]

ARGUMENT

Petitioner renews his contention (Pet. 13-29) that, for purposes of the bar to discretionary relief in the applicable version of former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), the "term of imprisonment" that he served for his prior felonies excluded time that he served by virtue of his status as a repeat offender. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals, and further review is unwarranted.

1. The court of appeals correctly held that, for purposes of Section 212(c), the "term of imprisonment" for an alien's prior aggravated felonies includes time served by virtue of the alien's status as a repeat offender. Under the relevant version of that provision, the Attorney General was prohibited from granting a waiver to an alien "who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. 1182(c) (1994). That language directs the Attorney General to consider all of the time that the alien actually served "for [an aggravated] felony or felonies." Contrary to petitioner's repeated contentions (Pet. 13-16, 23-24), when a jurisdiction subjects repeat offenders to an enhanced penalty, that penalty is no less a penalty "for" the underlying offense than the lower penalty applicable to first-time offenders; the recidivist penalty merely

---

[2] The court of appeals also rejected petitioner's contention that it would be impermissibly retroactive to apply the post-1990 bar on discretionary review in his case. Pet. App. 15-28. That holding is not challenged in the petition.

constitutes a "stiffened penalty for the latest crime." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948).[3]

As the court of appeals noted (Pet. App. 12-13), moreover, petitioner's interpretation of Section 212(c) would be difficult to apply in many cases, because Section 212(c) indisputably focuses on the term of imprisonment that an alien actually *served* for his aggravated felony (or felonies), not the term of imprisonment to which the alien was initially *sentenced*. Where the former term is shorter than the latter, it would not be immediately obvious how much of the time that the alien actually served was attributable to his status as a repeat offender. Indeed, this case presents that very difficulty: while petitioner was sentenced to a total of 76 months for his 1992 drug offenses (including a 36-month recidivist enhancement), he actually served a total of only 39 months. As the court of appeals observed (*ibid.*), it is difficult to imagine that Congress intended that, in determining the relevant "term of imprisonment" for purposes of Section 212(c), the Attorney General should prorate the time that the alien actually served in order to discount for time attributable to the alien's status as a repeat offender. See *id.* at 8 n.6 (explaining petitioner's proposal that "47% of [his actual sentence] should be prorated").

2. Petitioner cites no case in which any court has adopted his interpretation of Section 212(c). And even

---

[3] Petitioner contends (Pet. 15) that, in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that "recidivism does not relate to the commission of the offense." *Id.* at 488. *Apprendi*, however, stands only for the propositions that, as a matter of *constitutional* law, recidivism need not be treated as an offense element—and a jurisdiction may therefore choose to treat recidivism as a sentencing enhancement that a court can take into account without submission to the jury. See *ibid.*

if petitioner had identified a circuit conflict concerning the correct interpretation of that provision, such a conflict would not merit this Court's review, because the interpretation of that provision is of limited prospective importance. In 1996, Congress repealed Section 212(c) altogether, and replaced it with new Section 240A, 8 U.S.C. 1229b (2000 & Supp. V 2005), which provides for cancellation of removal—a narrower form of discretionary relief that is unavailable for *any* alien who has been convicted of an aggravated felony (without any discrete requirement concerning the term of imprisonment that the alien served for that felony). See p. 2 & note 1, *supra*. The question presented in this case is therefore even potentially relevant only to those aliens who, like petitioner, have been convicted of an aggravated felony but retain the ability to invoke the Attorney General's authority to grant discretionary review during the time period from 1990 (when the bar was originally enacted) to 1996 (when Section 212(c) was ultimately repealed). See *St. Cyr*, 533 U.S. at 314-326. For that additional reason, further review is unwarranted.

3. Petitioner contends (Pet. 6, 27-29) that "substantively the same issue" is currently pending before this Court in *United States* v. *Rodriquez*, No. 06-1646 (argued Jan. 15, 2008). In *Rodriquez*, the Court is considering whether a state drug-trafficking offense has a "maximum term of imprisonment of ten years or more," and therefore qualifies as a predicate offense for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), when the defendant was a repeat offender and the maximum term of imprisonment for the offense was ten years for such offenders. As the court of appeals noted in distinguishing its decision in *Rodriquez* (and its earlier deci-

sions involving other statutes on which petitioner relies),[4] the statute at issue in *Rodriquez* looks to the *potential* maximum term of imprisonment for a defendant's prior offense, not to the *actual* term of imprisonment that the defendant served. See Pet. App. 8-11. Thus, even if the Court were to hold in *Rodriquez* that, for purposes of the ACCA, the relevant "maximum term of imprisonment" for an offense is the maximum term to which first-time offenders were subject (even for repeat offenders), it would not follow that petitioner is entitled to relief, because the term that he actually served plainly included time served by virtue of his status as a repeat offender. To the extent that the Court concludes that the question presented in this case is similar to the question presented in *Rodriquez*, however, the Court may deem it appropriate to hold the petition pending its decision in that case.

---

[4] To the extent that petitioner contends (Pet. 5 n.2, 17-27) that the court of appeals' decision in this case conflicts with those earlier decisions, such a conflict would not justify further review even if it existed, because this Court does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending the Court's decision in *United States* v. *Rodriquez*, No. 06-1646, and then disposed of accordingly.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
BRYAN S. BEIER
ALISON R. DRUCKER
Attorneys

MARCH 2008